ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of Infrastructure
Sharing Provisions in the
Telecommunications Act of 1996

CC Docket No. 96-237

COMMENTS OF GTE SERVICE CORPORATION

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SUMMARY

GTE Service Corporation ("GTE"), as both a provider of facilities to other LECs and a sharer of other LECs' facilities, understands the importance of infrastructure sharing in expanding universal service. Congress intended Section 259 to allow smaller LECs to take advantage of the facilities of neighboring LECs to bring additional services to rural areas. Infrastructure sharing arrangements which promote this goal are already in place. Because the needs of each carrier are different, the Commission should leave carriers the maximum possible flexibility in developing sharing arrangements. Detailed, inflexible rules would discourage cooperation and prevent carriers from developing arrangements that meet unique needs.

In general, the Commission should adopt rules that essentially reiterate the language of Section 259 wherever possible. To provide additional guidance, the Order should:

- Clarify that, while qualifying carriers may either interconnect under Section 251 or enter infrastructure sharing agreements under Section 259, any infrastructure shared by a qualifying carrier pursuant to Section 259 cannot be used to compete with a providing carrier.
- State that no incumbent LEC may be required to develop, purchase, or install facilities based solely on a request from a qualifying carrier.
- State that proprietary information and marketing or business data are not subject to sharing requirements.
- State that Section 259 requires only sharing of infrastructure, not services.
- Determine whether an arrangement is economically reasonable by considering if it is cost-effective.
- Affirm that the pricing standards of Section 252 do not apply to Section 259.

- Refrain from adopting detailed pricing standards, which (1) are unauthorized, (2) would not take into account local conditions, and (3) would inhibit the parties' ability to come to agreements.

- Direct carriers to cooperate in developing sharing arrangements which promote the delivery of advanced services.

- Ensure that a qualifying LEC does not enable another LEC to resell facilities obtained through infrastructure sharing in the providing LEC's service area.

- Clarify that a providing LEC may withdraw from a sharing agreement that has become economically unreasonable upon providing reasonable notice.

- Ensure that providing LECs are not treated as common carriers for sharing arrangements and are therefore not subject to nondiscrimination requirements.

- Recognize that the states and the Commission each have limited roles in implementing Section 259 and that they share jurisdiction based on the nature of the service.

- Require that Section 259 infrastructure sharing agreements be filed with the appropriate state commission.

- Allow any mutually agreed to sharing arrangement, including but not limited to joint ownership.

- State that the Section 251(c)(5) network disclosure rules are broad enough to encompass the Section 259(c) disclosure obligation.

In determining which carriers lack economies of scale or scope and thus qualify for infrastructure sharing, the Commission must consider that the purpose of Section 259 is to increase the availability of advanced services. Therefore, the Commission should consider each LEC service area individually rather than on a holding company basis and should look at the circumstances surrounding each type of facility. In addition, the Commission should note that carriers may be both providing LECs and qualifying LECs under the Act for either different facilities or the same facilities but in different service areas.

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GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone operating companies, hereby files its Comments on the Notice of Proposed Rulemaking in the above-captioned docket.[1] GTE is vitally interested in this proceeding because it is affiliated with incumbent Local Exchange Carriers ("LECs") in 28 states throughout the country, serving urban, suburban, and rural areas. As discussed herein, GTE urges the Commission to adopt only minimal rules to implement Section 259 of the Telecommunications Act of 1996 ("the Act") and allow providing and qualifying LECs mutually to develop their own arrangements to the greatest extent possible.

GTE is well acquainted with the benefits of infrastructure sharing because its LECs both utilize facilities of others (as a "qualifying LEC") and share facilities (as a "providing LEC"). Congress was aware that these arrangements were already in place throughout the country and sought to encourage them so as to advance universal service goals. The language and the legislative history of Section 259 confirm that Congress intended infrastructure sharing arrangements to be mutually beneficial and

[1] Notice of Proposed Rulemaking, CC Docket No. 96-237 (Nov. 22, 1996)("NPRM").

based on negotiations between the parties. Therefore, the Commission should not adopt rules which presume that agreements will be difficult to reach. Rather, the Commission should recognize that most LECs already have developed these types of arrangements without Commission intervention and will continue to do so.

I. GENERAL GUIDELINES WILL ALLOW LECS TO TAILOR AGREEMENTS TO BEST MEET THEIR INDIVIDUAL NEEDS.

The NPRM properly recognizes that "the best way for the Commission to implement Section 259, overall, is to articulate general rules and guidelines," since "Section 259-derived arrangements should be largely the product of negotiations among parties."[2] GTE strongly supports this approach. LECs entering into infrastructure sharing arrangements are not competitors, so there is no need for rules to assure against discrimination and anticompetitive conduct. The fact that infrastructure sharing arrangements are already in place throughout the country shows that detailed rules are unnecessary.

In addition, broad guidelines will allow LECs to continue developing creative ways to provide additional services to their customers. Because each qualifying LEC will have different needs, flexibility is needed to accommodate individual requirements, operating conditions, and economics. For example, each LEC has a different network arrangement with different end office and tandem configurations which must be taken into account when developing a plan to share facilities. The Commission's rules should therefore preserve maximum flexibility.

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[2] NPRM, ¶ 7.

GTE is concerned, however, that notwithstanding the stated need for flexibility, many of the proposals in the NPRM go far beyond broad guidelines. Rather than minimizing disputes, detailed rules would narrow or prejudge infrastructure agreements. The Commission should encourage continued cooperation between providing and qualifying LECs by allowing carriers the latitude to negotiate innovative or creative arrangements which meet their unique requirements.

II. THE COMMISSION'S REGULATIONS TO IMPLEMENT SECTION 259(a) SHOULD SIMPLY REPEAT THE STATUTORY LANGUAGE.

The NPRM seeks comment on several proposals regarding the interpretation and implementation of Section 259(a).[3] GTE does not believe this Section requires any amplification. Accordingly, the best approach is for the Commission's rules to repeat the statutory language.

Infrastructure required to be shared. The Commission asks whether and how to define "`public switched network infrastructure, technology, information, and telecommunications facilities and functions'" for purposes of Section 259(a). This language requires no further explanation. The term "public switched network" modifies each of the terms which follows: "infrastructure, technology, information, and telecommunications facilities and functions." There is no basis either in the statutory language or the legislative history for separating these terms as the Commission suggests by asking first what constitutes "public switched network infrastructure" and then, as a separate item, how to define "technology, information, and

[3] NPRM, ¶¶ 9-19.

telecommunications facilities and functions."[4] In addition, given the Commission's articulated goal of assuring "necessary or desirable flexibility as technology continues to evolve,"[5] any attempt to define the categories of technology, information, and telecommunications facilities and functions that may be included would be inappropriate and unwise.

GTE disagrees with the supposition in the NPRM that resale, interconnection or unbundled network elements of the LEC, to the extent they are services, are encompassed within the requirements of Section 259. Section 259 requires only the sharing of infrastructure, not services.[6] When Congress intended to include services, it did so specifically, such as in Section 259(b)(2) which permits, but does not require joint ownership or operation of public switched network infrastructure and services. Subsection (a) contains no similar requirement that services be made available. Thus, providing LECs are not required to provide services to qualifying LECs, but only to allow shared use of facilities through which the qualifying LEC may provide services to its customers. The rules should therefore incorporate the language of the Act without expansion.

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[4] NPRM, ¶ 9. Later in the NPRM, the Commission recognizes that these terms together make up the infrastructure eligible for sharing. The proposal to separate these terms in 259(a) unnecessarily leads to the illogical conclusion that the availability requirement in (a) is somehow distinct from the infrastructure sharing agreement referred to in (c), which it is not. NPRM, ¶ 31.

[5] NPRM, ¶ 9.

[6] NPRM, ¶ 10.

Qualifying carrier. The Commission seeks comment on the distinction between a qualifying carrier under Section 259 and an interconnector under Section 251.[7] This distinction, in fact, is of central importance in this proceeding because Section 259 applies to cooperating carriers while Section 251 applies to competitors. Congress obviously envisioned a different relationship with different obligations for each arrangement.

GTE agrees that Section 259 applies "only in instances where the qualifying carrier does not seek to offer certain services within the incumbent [providing] LEC's exchange area,"[8] as suggested in the NPRM. By definition, a qualifying carrier must be "designated as an eligible telecommunications carrier under Section 214(e)" in its service area. Thus, in another service area, such as the service area of the providing LEC, that carrier would not be a "qualifying carrier." The Commission should clearly establish that any infrastructure shared by a qualifying carrier pursuant to Section 259 cannot be used to compete with the providing carrier. If the sharing carrier plans to compete in the providing LECs service area, that carrier must interconnect pursuant to Section 251 and forego the benefits of infrastructure sharing for that serving area. To this extent, Sections 259 and 251 are mutually exclusive.[9]

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[7] NPRM, ¶ 11.

[8] NPRM, ¶ 11.

[9] *See* further discussion of qualifying carrier in Section III, *infra*.

Proprietary technology and information. GTE disagrees with the Commission that LECs may be required to license proprietary technology pursuant to Section 259.[10] Unlike Section 251(d), which plainly requires providing LECs to provide proprietary technology under certain circumstances, Section 259 does not impose such an obligation. In some cases, a LEC would not be permitted to license such technology. An example of this would be GTE's Access and Storage Product. This product allows an alternative LEC ("ALEC") to create its own proprietary service based on its own service description to provide the service to its end users. This proprietary service is converted into a Service Logic Program (SLP) and placed on GTE's Service Control Point (SCP) for execution. In such cases, GTE is restricted from utilizing this customized SLP to provide service to its own end users or to another ALEC. The Commission should allow the parties to determine what information needs to be provided. However, if the Commission nonetheless requires LECs to make available access to proprietary technology, reasonable licensing arrangements are constitutionally required.[11]

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[10] NPRM, ¶ 15.

[11] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 139 (1969)(stating that a licensee must pay if he uses the patent); *Automatic Radio Manufacturing Co. v. Hazeltine Research*, 339 U.S. 827, 834 (1950)(patentee could require licensee to pay royalties for the privilege to use the patents); *United States v. National Lead Co.*, 332 U.S. 319, 335-51 (1947)(patent owners were required to license all patents at reasonable royalty to be fixed by the Court).

GTE also disagrees with the suggestion that the information disclosed pursuant to Section 259(a) might include marketing or other proprietary business information.[12] The legislative history regarding this provision states that the LEC is required "to provide ... information on the deployment and planned deployment of telecommunications service, equipment, and facilities."[13] Congress therefore intended that qualifying carriers have access to any additional information necessary to take advantage of the facilities they intend to share, not that they receive marketing or other proprietary information unrelated to the provision of facilities or the qualifying carrier's customer base. Because the parties to the infrastructure sharing agreements are not competitors, the providing LEC has no incentive to withhold relevant information which will allow the qualifying LEC to make use of the shared facilities, and expansive rules are unnecessary.

Joint network planning. The Commission asks if the language of Section 259(a) may imply a joint network planning requirement.[14] Joint network planning is currently done by all LECs to ensure continued network reliability. GTE does not believe that Section 259 imposes any additional joint network planning requirements. In addition, as explained below, LECs are only required to share facilities which already exist and are not required to construct additional facilities to meet qualifying carriers' needs.

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[12] NPRM, ¶ 16.

[13] H.R. Rep. No. 560, 103rd Cong., 2nd Sess., at 70 (1994)("H.R. Rep. No. 103-560").

[14] NPRM, ¶ 16.

Thus, no additional joint planning rules are necessary in order for Section 259 to be implemented.

III. QUALIFYING CARRIERS MAY UTILIZE SECTION 251 OR SECTION 259, BUT THE PRICING PROVISIONS IN SECTION 252 DO NOT APPLY TO INFRASTRUCTURE SHARING ARRANGEMENTS.

Sections 251 and 259 establish separate schemes for advancing different goals. Section 251 was intended to promote local exchange competition. Section 259, in contrast, is related to the Act's universal service objectives. As the Report of the House Commerce Committee on H.R.3636 (which contained a provision almost identical to Section 259) concluded:

> The basic premise of this subsection is that some local exchange carriers will have the economies of scale or scope that will allow them to offer advanced services and technologies to their customers. However, other carriers will lack these economies of scale or scope so that the cost of providing these services to their customers will be prohibitively expensive. Thus, this subsection seeks to promote the availability of advanced telecommunications services to customers located in sparsely populated and other rural areas, since such areas often do not offer economies of scale or scope to attract the provision of advanced telecommunications services.[15]

Thus, Congress intended infrastructure sharing to help accomplish its objective of making advanced services widely available rather than to increase competition between carriers. If the Commission creates the same types of regulations for Section 259 as for Sections 251 and 252, it will discourage the cooperative nature of infrastructure sharing.

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[15] H.R. Rep. No. 103-560, at 69.

Of course, qualifying carriers may obtain interconnection and access to unbundled elements under Section 251 in order to compete with a providing LEC in the providing LEC's service area. As an interconnector, however, the carrier is entitled to no better terms and conditions than any other interconnector. However, if the qualifying carrier decides to compete with the providing LEC in its service area, the carrier is not a "qualifying carrier" and cannot share infrastructure pursuant to Section 259.

Most importantly, the Section 252 pricing standards referenced in Section 251 are irrelevant to Section 259. If a qualifying LEC enters an infrastructure sharing arrangement under Section 259 rather than an interconnection agreement under Section 251, the prices and terms are to be negotiated by the parties without reference to Section 252, as discussed below. Similarly, providing LECs must provide services for resale and access to unbundled elements under Section 251, but not under Section 259. Conversely, a providing LEC may choose to make certain facilities available under Section 259 that it is not compelled to offer under Section 251, since qualifying LECs are prohibited from using such facilities to compete with the providing LEC. The fact that Congress specifically provided that such sharing arrangements were to be between non-competing carriers and did not repeat the unbundled elements and resale provisions in Section 251 shows that it intended Section 259 arrangements to be different.

IV. IN DETERMINING WHETHER A CARRIER LACKS ECONOMIES OF SCALE OR SCOPE, THE COMMISSION SHOULD EXAMINE INDIVIDUAL SERVICES AND CIRCUMSTANCES.

The determination of which carriers lack economies of scale and scope must be made with reference to the fact that Congress intended infrastructure sharing to expand the availability of advanced services. In addition to stating that this provision was designed to provide "services to customers located in sparsely populated and other rural areas," the House Report also explained that, to be considered a qualifying carrier, a LEC must "lack economies of scale or scope for a particular service or technology in a given geographic area," "be a provider of all universal services," and "offer these universal services to all customers throughout the corresponding exchange area ...."[16]

The Commission should allow carriers to demonstrate that they are unable to bring desired services because they lack a sufficient customer base in a specific geographic location or service area. A carrier should be permitted to show that it fits within these parameters, notwithstanding its size. In particular, the Commission should look at each specific service area individually rather than at the holding company level. Although the GTE telephone companies have a significant aggregate customer base nationwide, individual operating units are spread throughout the country and many are small and serving sparsely populated rural areas. An individual operating unit should be permitted to show that it is a qualifying carrier and should be able to share facilities in order to provide advanced services to its customers.

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[16] H.R. Rep. No. 103-560, at 69.

With respect to the types of carriers that may request infrastructure sharing arrangements, GTE agrees with the Commission that Congress intended to benefit primarily small LECs serving territories that are adjacent to the LEC from which sharing is sought.[17] As explained in the House Report,

> The Committee further finds that it would be economically unreasonable to require a local exchange carrier to share network technology and information and telecommunications facilities and functions with every qualifying carrier in the country. Rather, the Commission should impose reasonable limits on the ability of qualifying carriers to seek access, and should consider enabling a qualifying carrier to engage in infrastructure sharing only with a local exchange carrier that was reasonably proximate contiguous to the qualifying carrier's service area.[18]

Therefore, the Commission should not require LECs to share facilities with qualifying LECs which are not reasonably near the providing LECs service area, particularly when doing so would be economically burdensome.

The Commission should also recognize that a carrier may be both a providing LEC and a qualifying LEC under the Act. For example, a rural LEC may be eligible as a qualifying carrier to share the facilities of a neighboring LEC to provide SS7-based services. However, that same qualifying LEC may also have advanced technologies that a separate neighboring qualifying carrier may wish to share. It is also possible that a carrier will have certain facilities in one service area, but lack them in another. Thus, a carrier can be both a providing LEC and a qualifying LEC at the same time for the same and different services.

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[17] NPRM, ¶ 12.

[18] H.R. Rep. No. 103-560, at 69.

V. BOTH THE COMMISSION AND THE STATES HAVE A LIMITED ROLE IN IMPLEMENTING SECTION 259.

The Commission recognizes that Section 259 pertains to both interstate and intrastate communications. Nonetheless, the NPRM tentatively concludes that Section 259 gives the FCC almost plenary authority over infrastructure sharing, with only two exceptions: the filing provisions in Section 259(b)(7) and the power to indirectly define qualifying carriers by designating eligible telecommunications carriers pursuant to the Section 214(e) designation power referenced in Section 259(d)(2).[19] The Commission's jurisdictional analysis is incorrect and goes far beyond that authority granted by the Act.

To the limited extent infrastructure sharing arrangements are subject to regulation, the Commission and the states share authority under Sections 2(b) and 261(b) of the Act. Although it is true that Section 259 requires the Commission to adopt certain rules regarding infrastructure sharing, the states retain authority to regulate the intrastate aspects of infrastructure sharing arrangements, consistent with the direction in Section 259 that such arrangements not be treated as common carriage. This dual role is confirmed, for example, in Section 259(b)(7) which requires LECs to file infrastructure arrangements "with the Commission or the State." Accordingly, any disputes involving facilities used for intrastate services should be resolved by the states and disputes involving facilities used to provide interstate services should be resolved by the Commission. When such facilities are used for both intrastate and interstate activities, the parties should be allowed to choose either a state or federal forum.

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[19] NPRM, ¶ 18.

VI. THE RULES IMPLEMENTING SECTION 259(b) SHOULD TAKE THE FORM OF BROAD GUIDELINES RATHER THAN DETAILED PRESCRIPTIONS.

As GTE has explained, infrastructure sharing agreements are already in place among carriers throughout the United States based on voluntary negotiations. Although Section 259 requires the Commission to prescribe regulations, the Commission should adopt only very broad rules so that LECs can continue to develop arrangements which benefit both parties and meet each qualifying LECs' unique needs.

Section 259(b)(1). Section 259(b)(1) provides that the Commission's rules should "not require a local exchange carrier ... to take any action that is economically unreasonable or that is contrary to the public interest." In interpreting this provision, the Commission tentatively concludes that "no incumbent LEC should be required to develop, purchase, or install network infrastructure, technology facilities or functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent LEC has not otherwise built or acquired and does not intend to build or acquire such elements."[20] This conclusion is plainly correct. The only reasonable meaning of "sharing" is that the LEC providing the facilities will use them as well. Congress intended that qualifying LECs be allowed to take advantage of a providing LEC's facilities, not that the providing LEC become a construction company for the qualifying LEC.

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[20] NPRM, ¶ 20.

With respect to the meaning of "economically unreasonable," the legislative history makes clear that the relevant consideration is whether the provision of the requested facilities would be cost-effective. The Report of the House Commerce Committee explains that "the Committee intends to preclude a providing carrier from being required to provide a facility or establish capacity in a manner or to a degree that would not be cost-effective."[21]

Against this background, the rules implementing this subsection should simply repeat the statutory language. The Commission should clarify that (1) LECs need not develop, purchase, or install requested facilities if they have no intent of using them, and (2) in determining whether a requested arrangement is economically unreasonable, the Commission will consider whether the arrangement is cost-effective. Because this standard is not susceptible of precise definition, the Commission should not add further details to its rules.

In addition, the Commission should state that a providing LEC may withdraw from a sharing agreement that has become economically unreasonable upon providing reasonable notice to the qualifying carrier. For example, if the providing LEC has been allowing a qualifying LEC to utilize the providing LEC's facilities, but the providing LEC then determines that it is no longer cost-effective to maintain the shared facility, the providing LEC should be free to discontinue allowing shared use. The providing LEC is under no obligation to continue installing and maintaining facilities solely for the benefit of the qualifying LEC.

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[21] H.R. Rep. No. 103-560, at 69.

Section 259(b)(2). Section 259(b)(2) states that the Commission shall "permit, but shall not require, the joint ownership or operation of public switched network infrastructure and services ...." Although GTE agrees with the Commission that joint ownership arrangements are one means of meeting sharing obligations, participating carriers should be both allowed and encouraged to develop terms and conditions through their own negotiations.[22] There is no need to specify in the rules those methods of infrastructure sharing that satisfy Section 259, because each qualifying and providing LEC will have different network architectures and needs. Any mutually agreed-to arrangement (not just joint ownership) should be presumed to comply.

Section 259(b)(3). Section 259(b)(3) provides that the Commission's rules must assure that no LEC will be treated by the FCC and the states "as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier ...." The Commission asks whether this provision limits the obligation of LECs to tariff sharing arrangements or to expand capacity, and whether there is a nondiscrimination principle inherent in Section 259(b)(3) that requires the Commission to direct LECs to make such arrangements available to similarly situated qualifying carriers on the same terms.[23]

As an initial matter, the fact that these arrangements are not common carriage precludes the Commission from requiring that they be provided pursuant to tariff.

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[22] NPRM, ¶ 21.

[23] NPRM, ¶ 22.

Nonetheless, a providing LEC should be free to tariff such offerings at the state level if legally appropriate and desirable from a business standpoint.[24] In addition, as previously discussed, Section 259 should not be interpreted as requiring providing LECs to expand capacity to meet requests for sharing. Congress clearly intended that qualifying LECs share existing facilities, not that providing LECs be required to build new systems which they had already chosen for independent business reasons not to install. Moreover, simply because the statute requires that infrastructure sharing be available to any qualifying carrier does not mean that any such arrangement must be available indiscriminately to other qualifying carriers.

Finally, there is no basis in Section 259(b)(3) for imposing a nondiscrimination requirement. Nondiscrimination is the essence of common carriage, and freedom to negotiate individualized terms of service is the basis of non-common carriage. Congress plainly knew how to impose a nondiscrimination requirement when it so intended. In fact, Congress included a nondiscrimination principle in seventeen of the sections added to the Communications Act – but not in Section 259. The absence of an explicit nondiscrimination obligation in Section 259(b)(3) should be interpreted as precluding the Commission from imposing such a requirement.[25]

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[24] Under Section 203, non-common carrier interstate services may not be tariffed. 47 U.S.C. § 203(a). Section 259(b)(7) states that any tariffs, contracts, or other arrangements showing the rates, terms, and conditions for sharing of infrastructure under this Section must be filed with the Commission or the state. However, that subsection does not require that a tariff be filed in every case; it only directs that a tariff be filed if one exists.

[25] *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the

(Continued...)

Section 259(b)(4). Section 259(b)(4) requires the Commission to include guidelines in its regulations to "ensure that such local exchange carrier makes such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier ...." The Commission asks whether the "fully benefit" language "necessarily implicates questions about pricing" and whether there are any specific terms and conditions that should be included in the rules. It also suggests that national standards "might reduce costs for incumbent [providing] LECs and qualifying carriers by reducing or eliminating inconsistent state regulations and simplifying record keeping and other administrative burdens."[26]

Detailed rules (as opposed to general guidelines) in this area would be unwarranted, counter-productive, and contrary to Congress's express instructions. First, Section 259 gives the Commission no authority to establish pricing standards either expressly or by implication, and the Commission has no such authority under Section 201 because infrastructure sharing is not common carriage. Second, national standards would not take into account local conditions that may affect the costs of providing service. This is of particular concern when considering infrastructure sharing

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(...Continued)
same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")(internal quotations omitted); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996)(same).

[26] NPRM, ¶¶ 23, 24.

because of the different circumstances likely to surround each arrangement. Third, detailed rules would hinder carriers from developing unique sharing arrangements that may be especially well-suited for certain carriers in certain areas. The rules should therefore presume that any voluntarily negotiated arrangements satisfy the statutory standard.

Section 259(b)(5). Section 259(b)(5) requires the Commission to "establish conditions that promote cooperation between local exchange carriers to which this section applies and qualifying carriers." GTE supports the Commission's tentative conclusion that detailed national rules are not necessary.[27] Because these agreements will be between non-competing carriers and because economically unreasonable arrangements are proscribed, there will be no disincentive to cooperation between LECs and qualifying carriers. The fact that these arrangements are already in place demonstrates that the current conditions are promoting cooperation. Therefore, the Commission should merely direct carriers to cooperate in establishing mutually beneficial sharing agreements. If any difficulties do arise, the Commission's and state public utility commissions' complaint processes will be available.

Section 259(b)(6). Section 259(b)(6) prohibits the Commission from requiring a providing LEC to engage in any infrastructure sharing agreement for any services or access that the qualifying carrier will use to compete in the providing LEC's service area. As the Commission has concluded, this subsection should include any telecommunications or information service offered by the providing LEC directly to

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[27] NPRM, ¶ 25.

consumers or any access service offered to other providers which in turn offer services to consumers.[28] In addition, the Commission is correct to conclude that services or access acquired under this section cannot be used to compete in the LEC's service area. The Commission, however, should ensure that a qualifying LEC does not try to evade this restriction by permitting or enabling another carrier to resell facilities obtained through infrastructure sharing in the providing LEC's service area.

The Commission seeks comment on whether the term "services or access" in Section 259(b)(6) applies to all "public switched network infrastructure technology, information, and telecommunications facilities or functions" available pursuant to Section 259(a), or whether Section 259(b)(6) "limits an incumbent LEC's right to deny agreements to only a limited set of provisions, namely, `services or access.'"[29] Congress did not intend to distinguish between "services and access" in (b)(6) and the longer phraseology in (a). To preserve Congress's intent, the wording in (b)(6) must be read as encompassing any public switched network infrastructure, technology, information, and telecommunications facilities and functions that the qualifying carrier might obtain from the providing carrier and re-offer to the providing carrier's customers.

GTE concurs that a providing LEC must be able to terminate an agreement in the event it discovers that the qualifying carrier is using shared facilities to offer service or access in the providing LEC's service area.[30] GTE does not agree, however, that 60

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[28] NPRM, ¶ 26.

[29] NPRM, ¶ 27.

[30] NPRM, ¶ 27.

days notice of termination should be mandated. Sixty days may be an unreasonably long period to allow a qualifying LEC to take advantage of the providing LEC. If a qualifying LEC begins competing with the LEC in its service area using shared infrastructure, it will have intentionally disregarded one of the fundamental tenets of Section 259. There is no reason to compel such a breach of the rules to continue for 60 days. Therefore, an even more important reason for the Commission not to adopt particular rules is that the parties will likely include provisions for discontinuance of service in their agreements. Any Commission requirements will only interfere with this process.

Section 259(b)(7). Section 259(b)(7) requires the Commission to implement regulations requiring local exchange carriers to file with the Commission or state for public inspection any tariffs, contracts, or other arrangements showing the rates, terms, and conditions for sharing arrangements under this Section. The Commission is correct that this Section applies only to agreements reached pursuant to Section 259 and that all agreements should be filed with the appropriate state commission.[31]

The Commission also seeks comment on whether providing LECs must file agreements under which the carrier is making available technology, information, and telecommunications and functions listed in Section 259(a) or whether Section 259(b)(7) is limited only to public switched network infrastructure and functions. As in Section 259(b)(6), the filing requirement should be read as including all requirements to assure

[31] NPRM, ¶ 28.

a consistent construction of all Subsections of 259, in the absence of any evident reason for drawing a distinction.

VII. THE NOTIFICATION REQUIREMENT IN SECTION 251(c)(5) IS SUFFICIENT TO ENSURE THAT QUALIFYING CARRIERS RECEIVE ADEQUATE NOTICE.

Section 259(c) requires a LEC that has entered into a sharing arrangement under this Section to provide timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment to each party to such agreement. The Commission raises a multitude of questions regarding proposed disclosure regulations, asks whether the Section 251(c)(5) rules should apply to infrastructure sharing arrangements, and generally contemplates detailed disclosure requirements.[32] No such requirements are necessary or authorized.

First, it is not apparent that the Commission has authority to adopt rules to implement Section 259(c). When Congress expected implementing regulations, it stated so expressly. In contrast to Sections 259(b) and 259(d)(1), Section 259(c) does not direct the FCC to adopt rules. Second, even if the Commission had authority to adopt rules implementing Section 259(c), no such rules are necessary because the disclosure required by that Section is already encompassed within the disclosure required under Section 251(c)(5). Under Section 259(c), as made clear by the legislative history, providing carriers must disclose information about deployment and

[32] NPRM, ¶¶ 29-36.